No. 21,746

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

EVEREST & JENNINGS, INC.,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

RESPONDENT'S BRIEF.

LYMAN B. POWELL,
426 Bonhill Road,
Los Angeles, Calif. 90049,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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RESPONDENT'S BRIEF.

JURISDICTION.

As stated in General Counsel's Brief, this Court has juridiction, which is conceded by Respondent.

STATEMENT OF THE CASE.

Everest & Jennings[1] is a small wheelchair manufacturer in Los Angeles, California, employing approximately 300 people. For the past four or five years, the Company has been the object of approximately one union organizing campaign a year [Tr. 209]. Prior to this case, however, no unfair labor practice charges had ever been filed against the Company.

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[1]Hereafter referred to as the "Company".

In early February, 1965, the International Association of Machinists[2] began an effort to organize the employees at the Company [R. 32; Tr. 17-18]. Considerable organizing activity soon developed in the plant, production declined [Tr. 299], and talking and union activity on company time became a serious problem [Tr. 303].

On February 12, in response to the increased Union activity, the Company president, Gerald Jennings, addressed two letters to the employees [R. 32-33]. In the first letter he stated:[3]

> "The Machinists Union (IAM) is once again making a determined effort to sign up our employees and add their dues and initiation fees to its treasury. From information which has come to my attention, it is clear that the IAM is up to its usual tricks of making 'pie-in-the-sky' promises, misrepresentations as to what our employees could gain through unionization, and some of its adherents within the plant have been spreading false rumors and intimating that employees who don't fall in line with IAM drive will suffer for it if the union succeeds.
>
> "I have heard that some employees have been threatened by the 'inside' union organizers that they will be fired or lose their rights in the company unless they 'sign up.' This is *entirely false*, and any employee spreading such lies will be subject to severe discipline. The law protects every

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[2]Hereafter "Union" or "I.A.M."

[3]For clarification, respondent has reproduced the full text of paragraphs in the letters of February 12 from which only excerpts were taken in the petitioner's brief.

employee's right to *refrain* from joining unions or from taking part in union activity, just as it protects their right to join unions. If you are approached by any employee in the plant, or by outside union organizers or officials, with such threats, either expressed or implied, notify your supervisor or management immediately. We will take prompt action against the employee making such threats, or see that the NLRB prosecutes the IAM if its officials are responsible.

"In conclusion, let me assure all of my fellow employees that everyone working for Everest & Jennings is free to join or assist any labor organization, and is *likewise* free to *oppose* unions and to speak out in favor of the direct above-board relationship we have enjoyed in the past. The Company will not discriminate against employees because of their views one way or the other, and if a union should unfortunately come into this plant, we will honor our lawful obligation to bargain with it. But I want it to be clearly understood that I feel that no union is needed at this company, and that we should continue to work together in harmony on a direct and friendly basis as we have in the past. If any of you have any questions about company policy, the union campaign, or your lawful rights, feel free to contact the Personnel Department or any member of management." [R. Ex. 9].

The second letter stated:

"Management has been advised that certain employees are conducting union activities during working hours and are leaving their work stations

at such times and going into other departments for purposes unrelated to their work. Also some of our personnel have been told by the inside union agents that they will lose their jobs or certain other rights if they do not sign a union card. Persons making such threatening statements or violating company rules will be subject to appropriate discipline or discharge.

"Management wants to assure all employees that no one need join any union to retain his job or to continue to progress in this organization, and any statements to the contrary, are absolutely false. The law protects each employee's right to join or *not to join* labor organizations and forbids either employers or unions from interfering with the employees' free choice." [R. Ex. 23].

On February 19, 1965, the Company petitioned the National Labor Relations Board[4] for a consent election to determine whether its employees wished to be represented by the IAM [G.C. Ex. 1(a)]. On the same day, employee Truesdell Brown charged the Company with an unfair labor practice in terminating him [G.C. Ex. 1(e)]. Four days later, the IAM filed a petition for an election [G.C. Ex. 1(e)].

The following day, both parties agreed to a consent election to be held on March 5, 1965 [G.C. Ex. 1(c)]. The results of the election showed that out of 194 possible voters, 105 were against the I.A.M., 72 were for the I.A.M., 13 were challenged, one was void, and 3 votes were not cast [G.C. Ex. I(v)].

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[4]Hereafter "Board" or "N.L.R.B."

Six days later on March 10, the I.A.M. filed objections to the conduct of the election, seeking to have the results overturned [G.C. Ex. 1(s)]. One month later, on April 9, the Union filed unfair labor practice charges against the Company [G.C. Ex. 1(f)].

A. The Undisputed Evidence.

On February 12, 1965, Mary Cornelius, an employee, asked to speak with management; pursuant to an established practice of allowing employees to confer upon request with Company officials [Tr. 295], she was given this opportunity [Tr. 295-296; 380-381]. She explained to the Company officials present that Fred Davis, another employee, had been annoying workers in the upholstery department and had been talking with other employees about the Union during working time [Tr. 295-296, 379-380]. She asked what could be done to stop Davis from bothering the employees and what she and other employees could do to oppose the Union [Tr. 296].

With respect to the Fred Davis problem, she was told that because of the probability that the I.A.M. would file charges with the Board, the Company was reluctant to take disciplinary action against employees who might be Union organizers; however, the Company would enforce its normal rules, and if an employee wished to complain against another employee concerning violations of these rules, it would have to be in writing under oath [*ibid.*]. She was told that a Company notary in the office would, as usual, be available [Tr. 297].

As to the second question raised by Mrs. Cornelius, she was informed that she had the same rights to cam-

paign against the Union as other employees had to campaign for it, but that the Company could not lend her assistance or let her use Company facilities. She was also told she would have to adhere to the same rules as the other employees by limiting such activities strictly to her own time [Tr. 296, 380-381]. She then left and went back to her department. Shortly thereafter she turned in a sworn affidavit [Tr. 389; G.C. Ex. 16].

By her own uncontradicted testimony, Mrs. Cornelius informed other employees [Tr. 382] that they could complain about the violations of Company rules that irritated them. On the afternoon of February 12, approximately 21 other employees availed themselves of this opportunity. No Company officials were present when the statements were made or notarized. These statements in the employees' own handwriting, complained, in most cases, that certain other employees were bothering them about the Union "on the job" [G.C. Exs. 22, 25, 27] or "while working on my job" [G.C. Ex. 26].

Among the affidavits submitted by employees on the afternoon of February 12 were three charging that Fred Davis was soliciting for the Union during working hours. One of these was from Mrs. Cornelius stating, "I have been asked by Fred Davis to sign a card to get the Union in Everest & Jennings during working hours at different times and Wednesday morning February 10, 1965, he explained all the advantages of a Union in this company." [R. 34]. Another was from employee Weems stating, "I have been asked numerous times by Fred Davis to sign a union card during working hours." [R. 35]. Another from employee Miller said, "I have been asked on numerous occasions by Fred

Davis to sign a union card during working hours." [R. 35].

Upon receiving these affidavits, Vice-President Fred Callahan consulted with Ray Jenkins, superintendent of the plant where Davis worked. Recalling that in the Union campaign eleven months earlier Davis had been warned for engaging in Union activity on Company time, they decided to suspend Davis without pay for three days [R. 35]. Davis was called into Jenkins' office with his immediate supervisor, Don Reed, and asked if he remembered receiving a warning about a year ago [Tr. 95]. When Davis indicated that he did remember being given a warning notice, he was told that on the basis of three sworn affidavits he was being laid off for three days [*ibid.*].

At the same time, Mr. Callahan met with two plant superintendents and reviewed the affidavits that had been received [Tr. 326-348]. Some affidavits were also discussed with the individual's supervisor [Tr. 352]. Callahan then gave instructions to issue warning notices to the offending employees. These slips were prepared by the superintendents with the help of the personnel department. They were all identical [Tr. 352]. The slips were issued on the following Monday, February 15.

Upon receiving their warning slips, some of the recipients complained that they were not guilty. Others made no denial, or failed to until some time later. In all cases where complaints were raised by these individuals that they were not guilty as charged, investigations were made as to the truth of the affidavit [Tr. 358]. In a few instances, where it became apparent that the affiants had misconstrued the technicalities of

"working time", the departmental supervisor went back and made a full apology to the employee charged and the warning slip was withdrawn from his personnel file [Tr. 302]. In other cases, the affiants adhered to their sworn statement, and in these cases, the warning slips were not withdrawn [*ibid.*].

Among those employees given warning notices on Monday, February 15, was Truesdell Brown. Upon receiving his slip, Brown denied that he was guilty of the charge. In front of his supervisor he turned on another employee, Lee Melstrom, and either called him a "lying son-of-a-bitch" [Tr. 187:159] or asked Melstrom for support of his claim of innocence, and when he didn't receive it, then called him a "lying son-of-a-bitch" [Tr. 179-180:199]. In either event, both employees approached each other and had to be separated by the supervisor [Tr. 520]. During this altercation, Melstrom tried to explain that he had made a mistake in the affidavit and that Brown had engaged in Union solicitation after Brown had punched in, but before he began work [R. 37; Tr. 180:520]. Brown apologized to Melstrom for his actions and the men returned to work [R. 37].

Hester, the supervisor who witnessed the incident between Brown and Melstrom reported it to his superintendent, Godfrey. Vice-President Callahan was called in, and it was decided to give Truesdell Brown a reprimand[5] for using abusive language and threatening another employee [*ibid.*].[6] On the next day, Brown

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[5]Written warning notices of this type were established procedure in such cases. See Respondent's Rejected Exhibits 27 through 32, and Transcript 312-315.

[6]Published company rules in the employee handbook expressly prohibit such conduct.

was shown the warning notice and asked to sign it.[7] He again began using abusive language. Finally, he took the warning slip—which he was supposed to return to his supervisor to be placed in company files—and tore it into four pieces [R. Ex. 1]. He then threw it down on his bench in front of his fellow employees and his supervisor [R. 37; Tr. 181:523].

Godfrey reported to Callahan and Jennings what had happened [R. 37; Tr. 524]. A decision was made that since Brown had been insubordinate, he should be discharged.[8] Hester was told to bring Brown down to Callahan's office. Arriving at Callahan's office, Brown was told that he was being discharged for insubordination or destroying company property and asked if he had anything to say. Brown answered, "I have heard enough of this shit for one day," and then he left [R. 38; Tr. 184].

On February 24, 1965, assembly department foreman James Bredehoft went into the woodworking department and had a conversation with Fred Davis. In this conversation, they discussed the effects of unionization on the Company [R. 35-36; Tr. 96-97].

On February 25, Bredehoft was involved in a discussion with employee Werner Woelke.[9] In this con-

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[7]Signing a warning slip did not constitute an admission of guilt, but merely acknowledged receipt [Tr. 19:22; 24:10-13, 17; 526:10-17].

[8]After a full hearing, the State of California Department of Labor held that Brown's discharge was "for cause" and denied him unemployment compensation.

[9]This conversation and the later adjustment of Woelke's grievance were not alleged in the complaint, and were admitted into the record over Respondent's repeated objections. The Board ignored Respondent's Exception 10 concerning this denial of due process.

versation the question of Woelke's seniority rights came up, and Woelke complained that the Company had treated him unfairly by not giving him back his seniority after he had been discharged for fighting and then hired back. Bredehoft arranged a meeting for Woelke with the Company president to discuss the matter. In this meeting, upon the advice of the Company's labor consultant, Woelke's seniority was given back to him [R. 38; Tr. 162-164:185-487].

At some time before the election, employee Frank Medina had a conversation with his supervisor, Edward Gibola. Gibola told Medina that he did not want a union in the plant, but that Medina was free to make his own choice [R. 38; Tr. 142:467].

B. The Conflicting Testimony.

The circumstances surrounding many of the above events were the subject of sharply conflicting testimony.

1. The Discharge of Truesdell Brown.

On February 15, when Brown received a warning slip similar to others given out on that date, he testified that when he read it he looked up and saw another employee and that he said, "Lee, have you seen me do any company (sic) business after I have punched in?" [Tr. 179], or that he looked up and said, "Hey, Melstrom, for crying out loud, here is what I am accused of," [Tr. 198].

However, Bill Hester, Brown's supervisor testified to the following [Tr. 519]:

> "Q. I wonder if you would take your time and tell us what happens (sic) when you gave the warning slips to Truesdell Brown? A. Well,

I approached him at his work station, at his punch press.

His back was to me when I approached him.

I called his name and said, 'Tony, I have a warning slip for you to read and sign.'

He turned around and took the slip and started to read and then he raised his hands up and said, 'That lying son-of-a-bitch.'

He turned around towards Lee Melstrom, who was about thirty feet away coming towards us, and he said, 'Come here, you lying son-of-a-bitch.' "

On cross-examination Brown stated [Tr. 187]:

"Q. Now, is it not a fact that as soon as you received a warning slip and had a short discussion with him to the effect that you did not do it, is it not true that you at that point saw Lee Melstrom across the way approaching your area, approaching in your direction, and in a loud voice you said, 'You lying son-of-a-bitch, come here?' A. You may be right. I am not infallible, I do make mistakes and I may have signed it or that may have been after I signed it; it was in that same afternoon, yes, it was during that time."

2. The Testimony of Employee Fred Davis.

The testimony regarding the circumstances surrounding the alleged coercion of Fred Davis is also in sharp conflict. On direct examination, Davis testified to the following [Tr. 96-97]:

"Q. Directing your attention to February 24, 1965, did you have a conversation with Bredehoft concerning the union? A. Yes, I did.

Q. Where did this conversation take place? A. In my department.

He took me aside from my work for about an hour and a half approximately and asked me why I wanted a union, that we didn't need it.

He also showed me or proceeded to show me a wage scale of other plants which were organized and I said, 'What were they making before they were organized?'

He did not answer the question either.

Then he said, 'Do you know that if they are organized that they will go broke and close down?'

I said, 'Have you heard of this?'

He said, 'Yes,' but he didn't really answer me.

Q. Do you recall anything else that Mr. Bredehoft said? A. Yes, upon leaving, he said, 'You had better make sure you sign the right way.' "

Bredehoft, in direct conflict with Davis' testimony on direct examination, testified that the conversation only lasted "Ten minutes, fifteen minutes at the most" [Tr. 482], that he never said the plant would close down [*ibid.*], and that he said that Davis should vote ". . . the right way, the way he would be happy with" [*ibid.*]

On cross-examination, Davis clarified his previous testimony [Tr. 121].

"Q. All right, what else did he talk about during your long conversation with him? A. He talked about why I wanted the union and that we didn't need the union. He said that other companies have gone broke because the union got in.

Q. He said other companies had gone broke? A. He also said that we could go broke."

but he said something like that.

Q. Do you recall anything else Mr. Gibola said? A. He said about a petition going around and he asked me if I had already signed it. I said, no, that I hadn't. He said, 'Frank, you better not.'

But, I cut him short on that and I told him that I had had experience back home with a union that nearly cost me to pay a lot of or a sum of money.

And he told me that it was my privilege to do so, if I wanted a union.

When you are trying to remember, it is kind of hard.

3. The Testimony of Frank Medina.

Frank Medina testified that on February 26, he and his supervisor, Edward Gibola, engaged in a conversation concerning the I.A.M. [Tr. 141-142].

"Q. What did Mr. Gibola say and what did you say to Mr. Gibola? A. The conversation started that he didn't want any union in the shop. That is what I recollect anyhow.

He also told me that he didn't want no union and I didn't ask him why. Then the conversation started that I would lose about eighty-five worth of fringe benefits probably.

Q. Was there any other conversation?

(Pause.)

What else did Mr. Gibola say? A. That was about the conversation. He said we could lose the Christmas bonus probably, he didn't say they would take it away from us. He said they would probably take away the spring dinner and the Christmas breakfast. He didn't say the company would,

Q. What else did you say and what else did Mr. Gibola say? A. I told him that I would vote against it. He said, 'Frank, I am not trying to force you or trying to intimidate you; it is your privilege to do what you see fit.'

He did not try to persuade me in any way.

Q. What did you tell Mr. Gibola? A. I said I was going to vote against the union.

Q. What did Mr. Gibola say about the spring dinner and the Christmas bonus or Christmas breakfast? A. He said, we would probably or probably could lose it. That the company would probably take it away.

He said it was my right to vote either way.

He did not say anything for it or against it.

Q. That is what Mr. Gibola said about the spring dinner and the Christmas breakfast? A. Yes.

Q. Would you repeat what you said when he told you about the spring dinner and the Christmas breakfast? A. He said that probably we would lose them, he said that the company would probably take it away."

In direct conflict with this testimony, Edward Gibola stated [Tr. 467-468]:

"Q. Are you aware you are under oath and could be subjected to a perjury charge? A. Yes, I am.

Q. I want you to be entirely sure about this; did you ever tell Frank Medina that if the union came in, the company's free dinners would be lost? A. No, I never made a statement like that, never.

Q. Did you ever tell him that the employees would lose their christmas breakfast or their christmas bonus? A. No, I never did.

Q. Did you ever tell any employee, including Frank Medina, that employees might lose eighty-five cents an hour in fringe benefits if the union came in? A. That is another statement I never made."

At the end of his testimony, Mr. Medina said [Tr. 145-146]:

"Q. (By Mr. Powell): Now, on Friday, did you have a conversation with me when you were walking down the sidewalk? A. Yes.

Q. And as I was walking past after getting a hamburger down the street, did you stop me? A. Yes, sir.

Q. Did you not essentially tell me that you had been subpoenaed to testify? A. Right.

Q. Did you also tell me essentially, in words, that the testimony to be given about Gibola was not true? A. That is correct again.

Mr. Powell: Your witness.

Mr. Sadur: No further questions."

ARGUMENT.

I.

WHETHER SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND 8(a)(3) OF THE ACT.

A. The Board's Finding That a Company Rule Against Solicitation on Working Time Did Not Exist Is Erroneous.

During the last four or five years, Everest & Jennings has been the object of a Union organizing campaign approximately once a year [Tr. 209]. In each of these campaigns the Company has lawfully opposed unionization and has carefully had its attorney train its supervisors in their rights and duties under the Act [Tr. 259]. In none of these prior campaigns has the Company even been charged with an unfair labor practice. Similarly, at the beginning of the I.A.M. campaign, all supervisory personnel were again given training in what they could lawfully do and not do, so as not to interfere with employee rights [*ibid.*].

The entire record in this case indicates not only that a valid rule against solicitation during working time existed prior to the I.A.M.'s campaign, but also that the employees were consciously aware of it. Not one witness at the hearing denied the existence of such a rule prior to the I.A.M.'s organization attempt.[10] All of the direct testimony at the hearing indicates employees were not to solicit or campaign on company time.

Vice-President of manufacturing, Fred Callahan, testified that the Company had established practices re-

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[10]In fact, the General Counsel did not allege or seek to prove at the hearing that a valid no-solicitation rule did not exist; rather this novel theory appeared for the first time in the Trial Examiner's decision [R. 33-34; Tr. 133].

garding union solicitations and campaigning on Company time in prior Union campaigns [Tr. 300], and Company Vice-President Blickensderfer, in uncontradicted testimony, stated that the rule had been in existence prior to the I.A.M. campaign [Tr. 209]. There is no testimony by anyone to the contrary.

It is significant to the existence of the rule that none of the employees who were given written warning slips protested that they were not aware of the rule. As shown by General Counsel's witnesses, these employees either accepted the warning slips [Tr. 19] or denied that they had campaigned on working time [Tr. 65; 130; 158; 178]. No testimony was introduced suggesting that any of the employees were unaware that they were not to engage in solicitation or campaigning while on working time. In fact, some of the employees had been warned by Union representatives that they were not to solicit on Company time [Tr. 129].

The fact that this rule did exist is conclusively shown by the reprimand given to Fred Davis, eleven months before, for engaging in Union activity on Company time [Tr. 300]. The fact that the two incidents were basically similar was admitted by Fred Davis on cross-examination [Tr. 102]:

> "Q. (By Mr. Powell): About 11 months ago, Mr. Davis, were you orally reprimanded by your supervisor, Ray Jenkins, for talking on Company time about Union matters? A. Yes, I was.
>
> Q. Whether rightly or wrongly, at least you were aware there was such a rule, were you not? A. Yes."

In regard to Fred Davis' prior warning, in direct conflict with his own testimony [Tr. 102], the Board found that, ". . . the record does not reveal whether on

the earlier occasion he was absent from his work station, or visiting, or idling." [R. 39].

Despite the uncontradicted testimony in the case and the obvious inference from the testimony of General Counsel's own witnesses, the Board found that no rule existed prior to February 12, 1965 forbidding Union activity on working hours [R. 39]. In reaching this conclusion, the Board adopted the reasoning that "If this solicitation did not amount to 'visiting' or 'deliberate idling' or 'absence from assigned place of work,' it violated *no published rule.*" [*Ibid.* (Emphasis added)].

It is well settled, however, that valid no-solicitation rules governing working time do not have to be published. *N.L.R.B. v. Avondale Mills,* 357 U.S. 357 (1958). As stated by the Court in *N.L.R.B. v. W. T. Grant Co.,* 315 F. 2d 83 (9th Cir. 1963), "This (no solicitation) rule need not be promulgated to the employees in written form and can be given to individual employees in the form of warnings as was done in this case." The reasoning adopted by the Board ignores the applicable law and all of the direct testimony. It is therefore not supported by substantial evidence and should not be enforced. As stated by the Supreme Court in *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 490 (1951):

> "Congress has merely made it clear that a reviewing Court can set aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

B. The Board's Finding, in the Face of Opposing Uncontradicted Testimony, That the Company Encouraged the Filing of Employee Affidavits Is Not Supported by the Evidence.

The Trial Examiner, at the end of General Counsel's case, dismissed the allegation that the Company had solicited affidavits from its employees. At the close of the hearing, General Counsel made a motion to reverse this ruling, which was denied [Tr. 558]. However, in his decision, the Trial Examiner stated "(u)pon a review of the record I am now convinced that the refusal to reverse was erroneous, even if the original ruling was correct." [R. 39].

The Trial Examiner states that the company's counsel, Powell, suggested to Cornelius that the employees "report in affidavit form any sort of solicitation engaged in by union supporters." [R. 39].

The statements of the only two witnesses at this meeting who were asked to testify, Mr. Callahan and Mrs. Cornelius, establish that this did not occur. Cornelius was told by management, in answer to her question concerning what could be done about working time activities in her department, that because of the dangers inherent in disciplining possible Union organizers, the Company would have to insist that any employee making accusations put them in writing and swear to their truth [Tr. 324, 380-381].[11] Mrs. Cornelius and Callahan both testified that the Company's attorney so stated, and that no one asked her or encouraged her to

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[11]The N.L.R.B. itself takes sworn affidavits from witnesses and relies upon them in determining whether formal complaints should issue.

make a complaint against anyone [Tr. 298; 299; 324; 381].[12]

After the conference with Company officials, Mrs. Cornelius filed an affidavit and then proceeded on her own [Tr. 382] to inform other employees who had likewise been bothered that they could file affidavits. These other employees then voluntarily came in on the afternoon of February 12, 1965, and filed written complaints [R. 34]. Since all employees had the right to complain, management did not prevent them from exercising this right. There is no evidence on the record or off that a supervisor or member of management was present when they gave their statement, that they were told what to say, or that any pressure whatsoever was put on them to make their statements.

The single arguable exception is found in the testimony of Ervin Sinor, that following repeated complaints by him to his supervisor about being bothered by four employees on working time to sign a Union card, his supervisor, Earl Ruffner, came to him on February 12, and told him to go down to the office and make a statement to the notary [Tr. 505].

Ruffner testified without contradiction that Sinor and several other employees in his department had complained to him about being harassed during working time by Union organizers to sign cards, but that he had not taken any action prior to February 12 because of instructions from higher supervisors. While talking casually with the payroll clerk, who also served as a no-

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[12]The Examiner credits Cornelius' testimony, and finds that "Powell added that he was not encouraging her to take such action but that she was privileged to do so." [Trial Examiner's Decision, 4:39-41].

tary public, Ruffner discovered that employees were being allowed to complain in writing about Union activity on working time [Tr. 515-516]. He then went back to Sinor and told him that he could file an affidavit in the front office [Tr. 513].

Other than this isolated incident, it appears conclusively from the evidence that the affidavits were filed spontaneously by the employees after they had either heard about the procedure at lunch time from Cornelius or from other employees. Since all direct testimony indicates that the Company did not encourage its employees to report rules violations,[13] the Board's conclusion is in reality an unwarranted inference. As such, it falls under the Rule that ". . . if the Examiner's determinations and findings are unsupported by any substantial evidence in the record as a whole, or if his inferences drawn from the evidence before him are unwarranted, his conclusions may be judicially reviewed, and, if found wanting, set aside." *Wah Chang Corp. v. N.L.R.B.*, 305 F. 2d 15 (9th Cir. 1962); *N.L.R.B. v. Isis Plumbing & Heating Co.*, 332 F. 2d 913 (9th Cir. 1963).

Similarly, in *N.L.R.B. v. W. T. Grant, supra,* the Court found that the inference that management knew of the anti-union activity of an employee in the face of direct conflicting testimony was unwarranted.[14]

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[13]Even had the company told its employees to report violations of plant rules, it has never been explained how this could be a violation of law.

[14]Petitioner, in its brief, cites *N.L.R.B. v. Howard Cooper Corp.*, 259 F. 2d 558, 559-560 (9th Cir. 1958) and the cases cited therein. These references are inappropriate since they concern cases where the employer encouraged deauthorization or de-

(This footnote is continued on the next page)

C. The Finding of the Board That the Company, After Receiving Sworn Complaints From the Other Employees, Issued Warning Notices to Harass Pro-Union Employees Is Erroneous.

In its decision, the Board held that the giving of warning notices to seven employees was part of an overall plan of harassment by the Company of Union supporters. In reaching this result, the Board relied on the fact that the Company supposedly acted in haste and without any investigation whatsoever [R. 40].

The uncontradicted testimony shows, however, that Company officials, since the early part of the I.A.M. campaign, had been faced with declining production; that there had been an increase in unnecessary talking among the employees [Tr. 303]; that Mrs. Cornelius had stated that in her department one of the union supporters was passing out cards and soliciting during working time [Tr. 379]; and that 20 or more employees had sent in written complaints reporting working time union solicitations by other employees. In these circumstances, the Company's natural reaction was to immediately remind employees of the existence of the no-solicitation rule. This the Company did through its routine procedure of written notices and through the letters of February 12 to all the employees.

Admittedly, the Company undertook no formal investigation before issuing the warning beyond questioning the individual's immediate supervisors [Tr. 352]. However, neither customary industrial practice nor the Taft-Hartley Act require employers to disci-

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certification petitions. There is an obvious distinction between employees filing sworn complaints that other employees have violated plant rules and signing petitions which repudiate their allegiance to the Union.

pline employees with the same safeguards accorded criminal defendants. The Act requires only that the employer not discriminate on the basis of union or non-union membership. *N.L.R.B. v. Sebastopol Apple Growers Union,* 269 F. 2d 705 (9th Cir. 1959). In the absence of discrimination, it is accepted law that the Company had the right to hire, fire, or discipline in any manner it chose. *N.L.R.B. v. Prince Marconi Mfg. Co.,* 329 F. 2d 803 (1st Cir. 1964). The record indicates that the Company, when notified of violations, gave warning notices for all campaigning on company time, whether pro-union or anti-union [Tr. 261].[15]

With the exception of Davis, who was a repeat offender, no discharge, layoff or other disciplinary action was taken or was intended to be taken. The "warning" slips were just that. Some of the accused accepted their

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[15]The Examiner's Decision, adopted completely by the Board in this respect, finds that Respondent openly permitted anti-union campaigning while stifling union campaigning. He notes instances in which several women were seen leaving departments a few seconds after the whistle blew; in only one case is there any indication that this was observed by a supervisor, the supervisor involved had no authority over the particular women employees, and they were already departing at the time it was called to his attention [Tr. 153:20-21]. The Examiner finds that union supporter Davis overheard these women talking in their department about the union, but the undisputed evidence shows that their supervisor could not see or hear these employees from where he was located in the room, and that on the only occasion when it was mentioned to him by Davis, the supervisor went to the women and stopped the discussions [Tr. 109:22-25; 110:8-19; 99:8 and 110:21-25]. The only other incident on which the Examiner's finding is based is a situation in which he credits a union supporter's statement about what a partially-deaf supervisor "heard" in a room in which the supervisor was watching another employee and noisy machines with high-powered motors were operating [Tr. 423-424]. On the only occasion when it was clearly shown that anti-union campaigning on company time came to the attention of management, the two employees involved, Cornelius and Weems, were given warning slips; this uncontradicted fact is rejected by the Examiner as "merely pro-forma".

warnings without complaint, and the matter ended. A few other employees protested, either immediately or at some later time, that they had been unjustly accused. These protests were investigated, nearly all of them within a matter of minutes or hours [Tr. 22-23; 41-41; 67-68; 78-79; 149-150; 158-159; 302; 358; 361; 434-435; 527; 528-530; 550; 555]. The employees who had filed affidavits were called into the Company offices and questioned to determine whether their reports were truthful and accurate. In some instances it was determined that the employees involved had misunderstood what "Company time" included and that the union activity of the person accused had been at lunch or coffee break. In these instances, Company officials withdrew the warning slips from the personnel file of the person accused and his supervisor promptly delivered an apology on behalf of the Company [Tr. 149; 158; 302; 358; 361]. In most instances, the employees who had reported the violations stuck to their stories. After evaluating the denial and the reaffirmed accusation in these cases, the Company decided to persist in the warning, particularly since it was just a precautionary warning and carried no penalty unless again violated.

D. The Board's Finding That the Company Laid Off Fred Davis for Three Days Because of His Union Activities Rather Than for His Second Violation of a Valid Solicitation Rule, Is Unsupportable.

The layoff of Fred Davis stands in the same position as the other warning slips, except that as the only repeat offender, Fred Davis received a short layoff rather than a warning notice. The Board's finding here proceeds from the erroneous conclusion that there was

no rule against Union solicitation during working hours prior to February 12. However, the record establishes that the Company rule had long been interpreted to prohibit all Union solicitation during working hours. Davis himself admittedly had been reprimanded under the rule less than a year before, and his supervisor, Jenkins, recalled the prior incident to him at the time of his layoff [Tr. 95]. He was told at the time that his layoff was for soliciting during working hours [Tr. 93-95]. While Davis claimed that he was not guilty, he never expressed any surprise at the rule itself. In fact, at the hearing, he admitted he was well aware of the rule [Tr. 102]. Neither Davis nor any other employee ever claimed that no such rule existed or that they had not been informed of it; their defense was that they knew of the rule and were not guilty of breaking it.

The Board credits Davis' testimony that he denied to superintendent Jenkins that he was guilty [R. 41]. Whether he denied it or not however, is immaterial. Davis had in fact violated the rule before, and the Company had received, in addition to the oral report from Cornelius, three sworn affidavits stating that he was doing so again. Davis himself acknowledged that because of the great deal of talking he was doing, the Company might have good reason to think him guilty [Tr. 103]. The record indicates that, in fact, Davis *was* soliciting for the union during working hours. Marvin Cheek, who worked in the same room with Davis, testified that Davis initiated discussions with him and sought to get him to sign a Union card during working time almost every day [Tr. 533-543]. The Trial Examiner credited the testimony of Cornelius that Davis tried to get her to sign a Union card during

working time [R. 39]. Similarly, he credited the testimony of Weems that Davis approached her during working time and indicated that she could remedy her difficulties by signing up with the Union [*ibid.*].

The facts in this case are similar to those in *N.L.R.B. v. W. T. Grant Co., supra* (9th Cir. 1963), where the Company, after giving the employee an oral warning not to campaign for the Union on Company time, discharged her for Union solicitation during working hours. The court found that a no-solicitation rule promulgated in the form of an oral warning was valid and that a subsequent discharge for violation of such rule was not illegal.

E. The Finding That the Company Terminated Truesdell Brown as Part of an Anti-Union Campaign Is Untenable in the Face of Brown's Destruction of Company Property and His Use of Abusive Language.

On February 15, Truesdell Brown was served with a warning slip similar to the others given out on that date. Brown testified that when he read it, he looked up at Lee Melstrom and merely said, "Hey, Melstrom." [Tr. 198]. When Melstrom replied that he had seen Brown soliciting while at work, Brown admitted that he blew up and called Melstrom a "lying son-of-a-bitch." Afterwards, according to Brown, he and Melstrom got their differences straightened out and Brown apologized to Melstrom [Tr. 179-180].

Brown's supervisor, Bill Hester, also related that immediately after reading the slip, Brown flew into a rage and shouted to Melstrom, "Come here, you lying son-of-a-bitch." [Tr. 519]. He testified that there was considerable confusion and arguing and that Brown drew

back to strike Melstrom and that he had to step between them [*ibid.*].

Hester's testimony is the more credible in the light of succeeding events. When Hester related the incident to Callahan and Superintendent Godfrey, they decided that the direct violation of published Company rules [R. Ex. 3]—engaging in abusive language and threatening a fellow employee—merited at least a warning notice. This time when Brown was given the warning notice, there is no dispute that he immediately flew into a rage and complained that the Company was trying to fire him [R. 37; Tr. 179]. Godfrey told him that this was not true and that the slip was simply to reprimand him for his threats and abusive language [Tr. 547]. Brown, however, defiantly ripped his warning notice (including copies which were to go into the Company's file [Tr. 360]) into pieces and threw it down in front of his supervisors and his fellow employees [Tr. 526].

Under these circumstances, Brown's termination was completely justified.[16] Employers need not tolerate the direct violation of plant rules. *Salinas Valley Corp. v. N.L.R.B.*, 334 F. 2d 604 (9th Cir. 1964); *N.L.R.B. v. J. C. Britton Co.*, 352 F. 2d 797 (9th Cir. 1965); *N.L.R.B. v. Soft Water Laundry*, 346 F. 2d 930 (5th Cir. 1965); *Continental Distilling Sales Co. v. N.L.R.B.* 348 F. 2d 246 (7th Cir. 1965). Brown's initial reaction was in direct contrast—even as he testified to it—to the actions of other employees, who also had been given warning notices. His response to the second warning notice was outright insubordination in front of other employees. If he felt that he had been wronged,

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[16]As indicated previously, the State of California, after a full hearing so held.

he had the same right as the other employees to protest his case. He did not have the right to tear up a record which was to go in the company files, to show disrespect to supervisors, or to abuse and threaten his fellow employees. Brown's entire attitude is summed up in his final interview where he was asked if he had anything to say for himself. He told Vice-President Callahan, "Do I have to stand here and listen to any more of this shit?" [Tr. 525].

F. The Finding That the Company Threatened Employees Medina and Davis With Loss of Economic Benefits Is Not Valid in View of the Conflicts in the Testimony of Each Employee.

The Board found that ". . . Bredehoft said that a union victory might or could cause the closing of the plant . . ." [R. 40]. This conclusion was reached by crediting the testimony of Fred Davis over that of his supervisor, Bredehoft. Given conflicting testimony of equal weight, the issue of credibility was for the trial examiner. However, in this case, the Board totally ignored that Davis himself later clarified what Bredehoft had actually said to him. In his later testimony, Davis explained that Bredehoft actually said: "other companies have gone broke because the Union got in."[17] [Tr. 121-122]. "Going broke" is an event over which the Company has no control and is, therefore, merely a legal expression of opinion. *J. S. Dillion & Sons Stores Co. v. N.L.R.B.*, 338 F. 2d 395 (10th Cir. 1964); *Texas Industries, Inc.*, 336 F. 2d 128 (5th Cir. 1964); *Henry I. Siegel Co., Inc.*, 328 F. 2d 25 (2nd Cir.

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[17]This statement is far more consistent with "the published view of the Respondent that a Union might reduce its chances of competing successfully." [R. 40].

1964); *N.L.R.B. v. Brownwood Mfg. Co.,* 363 F. 2d 136 (5th Cir. 1966). In *N.L.R.B. v. Transport Clearing, Inc.,* 311 F. 2d 519, 524 (5th Cir. 1962) when the company told employees that unionization might force it out of business, the Court said:

> ". . . (This) is an example of a prophecy by an employer of dire consequences that may flow from a Union's policy or practices rather than from action and is privileged under the free speech section of the Act."

The Board also credited the testimony of Frank Medina that on February 26, his supervisor said that a union would bring about an end to fringe benefits totalling eighty-five cents an hour, and could, or would, cost the employees their Christmas bonus, the spring dinner, and Christmas breakfast. Again, conflicting testimony of equal weight provides an issue of credibility for the discretion of the trial examiner. However, here also the Board totally ignored the later statements of the witness it credited. As reported in the Statement of Case, Medina was asked if he had not said that the testimony to be given about Gibola was not true. Medina's affirmation that the testimony would not be true is passed over by the Board with the statement, "that untrue testimony would be or might be offered against Gibola, had no reference to Medina's own testimony." [R. 41]. The facts indicate, however, that the only allegations directed at Gibola and litigated were those involving Medina, and, in fact, Medina was the only witness to appear concerning Gibola. To say, therefore, that Medina was not referring to himself, is totally untenable and is not supported by the record.[18]

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[18]The Examiner states that Medina was not shown to be a Union supporter. If not, it is remarkable that he filled out his pre-trial statement at the union hall [Tr. 143.20].

G. The Board's Conclusion That the Company Adjusted Woelke's Seniority Rights in an Attempt to Weaken His Interest in the Union Is Unsupportable.

The Board found[19] that by granting a more advantageous seniority date to Woelke in an attempt to weaken his interest in the Union, the Company discriminated in regard to his tenure of employment, discouraging activity on behalf of the Union, thereby violating Section 8(a)(3) and 8(a)(1) of the Act [R. 40]. This finding is unsupportable. The bare essentials necessary to a *prima facie* violation here would be (1) proof that the Company's officials who considered and ruled upon Woelke's grievance knew of his Union sympathies, and (2) that their motivation was an illegal and improper one. Unlawful motives are not lightly to be presumed. The burden is on the General Counsel to prove the essential elements of his charges by a preponderance of the evidence.

The Board's decision assumes that the Woelke matter was not the routine handling of a grievance and that Respondent's officials knew of Woelke's Union sympathies and intended, by their favorable handling of the grievance, to lure Woelke away from the Union. These assumptions are not supported by the record. The Company's published grievance procedure provides that a grievance shall proceed through various steps at the option of the employee. It first goes to the employee's supervisor, secondly to the personnel department, and thereafter the procedure permits the grievant, if he wishes, to obtain the counselling and rep-

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[19]This incident was not alleged in the complaint, and evidence concerning it was taken over Respondent's objections.

resentation of the Company's labor attorney. Finally, the employee is entitled to obtain a meeting directly with the Company president. Woelke had earlier pursued his grievance only as far as the personnel department and then apparently dropped it. It was certainly, therefore, not any material departure from the established grievance procedure to permit him to resort to the final two stages of the grievance procedure by setting up a meeting with the Company president and its labor attorney.

More importantly, the record establishes, without contradiction, that there existed an "open-door policy" which permitted employees to present individual complaints to top management at any time [Tr. 295]. The employee's privilege under this policy was in addition to any he might have under the grievance procedure. The Company's actions, therefore, were merely an effectuation of their own well-established policies. The denial of these procedures to Woelke would have resulted in a charge that the employer was discriminating, in violation of the Act, against Woelke because of his Union membership.

The Board's second assumption is based upon a fact directly contrary to the evidence. The Board expressly found that supervisor Bredehoft informed the other Company officials of Woelke's Union sympathies. The record, however, is directly to the contrary. Bredehoft testified that he did not mention to management officials anything about Woelke's Union membership or sympathies, either before the grievance meeting [Tr. 485-486], or at the meeting [Tr. 486-487]. Woelke testified that there was no mention at the meeting of his discussion with Bredehoft about the Union, no

mention of his union views, and in fact, no mention of the word "union" at all [Tr. 170].

The Boards decision, therefore, is based entirely on conjecture and supposition. It is, in fact, directly contrary to the evidence.

Conclusion.

For the foregoing reasons the decision of the National Labor Relations Board on the record as a whole was not based upon substantial evidence and, therefore, should not be enforced.

LYMAN B. POWELL
Attorney for Respondent.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LYMAN B. POWELL